Department of Law Monthly Report

Department of Law
Office of the Attorney General
State of Alaska

March, 2004
Issue Date – May 5, 2004

Gregg D. Renkes
Attorney General

Scott J. Nordstrand
Deputy Attorney General – Civil Division

Susan A. Parkes
Deputy Attorney General – Criminal Division

In This Issue

COLLECTIONS & SUPPORT 1
COMMERCIAL & FAIR BUSINESS 3
ENVIRONMENTAL 5
HUMAN SERVICES 5
LABOR & STATE AFFAIRS ……..7
LEGISLATION & REGULATIONS 8
NATURAL RESOURCES..... 8
OPINIONS, APPEALS & ETHICS..... 10
TORTS & WORKERS' COMPENSATION . 10
TRANSPORTATION 10
CRIMINAL DIVISION 11
OSPA 16
PETITIONS & BRIEFS OF INTEREST 16
COURT DECISIONS OF NOTE – ALASKA 17

Collections & Support

Collections Unit

March was a busy month for victim restitution. The Collections Unit opened 138 criminal and 31 juvenile restitution cases for collection. We returned 10 judgments to the issuing courts due to insufficient information. Initial notices were sent to 196 recipients. Ninety-three judgments were paid in full, and satisfactions of judgment were filed. Our office received payments totaling $52,128.22 toward criminal restitution judgments and payments totaling $9,407.87 toward juvenile restitution this month. We requested 242 disbursement checks and sent 326 checks to recipients.

Debtor in Bankruptcy Required to Pay Support Arrears

AAG Susan Daniels successfully defended CSED against a claim by a debtor in bankruptcy who objected to CSED's claim for child support arrears. The debtor claimed that he had been trying for years to obtain paternity testing through CSED. However, when Ms. Daniels researched the files, she determined that, in fact, CSED had attempted for years to obtain the debtor's cooperation with paternity testing and defaulted him only after he repeatedly refused to cooperate. The debtor

tried to set the default paternity judgment aside many years later, but the superior court rejected that request and issued a seven-page decision describing the debtor's bad behavior. After Ms. Daniels submitted that documentation to the bankruptcy court, the debtor withdrew his objection. It was subsequently determined that the debtor's mother had left him her house in her will, and that house may be used to pay off the debtor's $176,000 child support debt.

AGO Trains CSED in Bankruptcy Filings

AAG Susan Daniels and paralegal Linda Vahey completed a course of bankruptcy training for CSED caseworkers who will now take over the routine bankruptcy filings.

Settlement Reached in Support Case Concerning Revocation of Passport

AAG Kevin Williams brokered a settlement in the *Conde* appeal, in which an obligor appealed a CSED decision to revoke his passport for failure to pay support. The obligor owed about $150,000 in arrears and had never made a child support payment. He is an international pilot, living in Belgium, who claimed that the passport was vital for his work and was necessary to keep his new family from being deported to Cambodia. In a separate proceeding, which was later consolidated with the appeal, the obligor asked the court to set aside the underlying child support order, which was issued by the superior court by default. The superior court granted that request, setting aside the default order and establishing a new support order based on the obligor's historic earnings. The outstanding arrears under the new order were around $110,000. The custodial parent sought reconsideration of this decision.

Just before the hearing, CSED explored settlement with both parties. Although the obligor had little money of his own, his parents were willing to loan him money to resolve the matter. At the hearing, the court asked the parties to proceed to a settlement conference. CSED proposed a settlement in which the passport revocation would be abated in return for (1) an immediate payment to the custodial parent of $15,000; (2) an agreement to make monthly payments that would cover the ongoing support and an amount toward arrears; and (3) the dismissal of the obligor's appeal of the passport revocation. The parties agreed that CSED would resume all enforcement activities, including passport revocation, if the obligor missed a payment. After some mild arm twisting and a reminder from the court that the agreement would allow all of the parties, including CSED to avoid considerable future attorney fees, the parties accepted CSED's proposal.

Court Includes " Basic Housing Allowance" in Income Calculation

AAG Pamela Hartnell, with assistance from paralegal Karol Alderman, obtained an interesting decision relating to the inclusion of the Basic Housing Allowance (BAH) received by military members as income for purposes of calculating child support. CSED calculated Sgt. Lemon's modified child support obligation using his actual BAH, which included an extra $500 per month because (1) he supports the children in this case, and (2) he has a current wife and subsequent children living with him. Sgt. Lemon opposed the modification, arguing that the BAH was for his subsequent family and that, without them, he would not receive the BAH.

Ms. Hartnell contacted Air Force personnel, who advised that Sgt. Lemon would receive BAH of $791 per month if he had no dependents and $1,018.70 per month if he had only the children for whom CSED sought support. Sgt. Lemon actually received $1,287 per month based on the fact that he had the children for whom CSED sought support and subsequent dependents living with him. The court chose to include $1,018.70 as income for purposes of calculating support.

Commercial & Fair Business

Real Estate Commission Suspends One License for 4 Months, Allows Another License to Expire At March Meeting

On March 4-5, 2004, at its regular meeting, the Real Estate Commission: 1) adopted the hearing officer's proposed decision and imposed a four month suspension against Anchorage associate broker Bonnie Mehner, and 2) adopted a settlement agreement with Anchorage salesperson Jamie Moyer wherein she let her license expire and agreed never to practice again in Alaska.

Following a hearing in October 2003, the hearing officer issued a proposed decision on February 17, 2004, and found that the Division of Occupational Licensing prevailed on seven of the eight counts alleged in the accusation filed against Bonnie Mehner, including substantial misrepresentation (4 counts) and violation of the dual agency disclosure statute (3 counts), related to her involvement in the sale of a residential property in 1999. The hearing officer found that the evidence in the case, including Mehner's "abundant inconsistent testimony," reflected a "continuing lack of accountability to licensing laws." In addition to the 4 month suspension (which began on March 15, 2004), Mehner was fined $20,000, was required to attend continuing education classes concerning conflict of interest and dual agency, and will be on probation for one year after returning to active status. AAG Robert Auth represented the Division at the hearing and throughout this matter.

On January 29, 2004, the Division and Jamie Moyer agreed that Moyer would not renew her license, which had an expiration date of January 31, 2004, and Moyer further agreed never to seek reinstatement of any real estate license in the future, in exchange for the Division dismissing its accusation, which alleged that Moyer notarized a signature on a document without actually witnessing the person sign it and that she failed to disclose on a renewal application that she had been sued for dishonesty and fraud. AAG Robert Auth represented the Division in this matter and negotiated the settlement with Moyer's attorney.

Nursing Board Approves Memorandum Of Agreement With Certified Nurse Aide

On March 10, 2004, the Board of Nursing approved a Memorandum of Agreement ("MOA") between the Division of Occupational Licensing and an Anchorage certified nurse aide wherein the CNA agreed to pay a fine of $1500 (with $750 suspended), accept a reprimand, attend elder abuse and patient rights courses, and be on probation for two years, based on her conduct as alleged in the accusation filed by the Division that, while working at the Anchorage Pioneers home, she left the upper body of a female patient uncovered for 3 minutes, and she improperly drummed on the back of another patient with her open hand, in order to loosen the phlegm in his lungs. AAG Robert Auth represented the Division in this matter and negotiated the settlement with the CNA.

Regulatory Commission of Alaska Hears Enstar/Northstar Gas Contract- RCA Docket U-03-084

This case came before the Regulatory Commission of Alaska in August involving a request by Enstar for Commission approval of a gas supply contract with NorthStar Energy Group to supply new natural gas to Homer for service to Homer. Under its tariff on file with the RCA, Enstar is required to obtain RCA approval of its gas supply contracts.

Under the NorthStar contract, like all of Enstar's gas supply contracts, all gas costs are passed directly through to rate payers through Enstar's fuel adjustment clause. Thus, Enstar is largely,

if not completely, economically indifferent to the cost of gas it negotiated under its agreement.

At a hearing held in January, the AG contested questionable provisions in the agreement, including: (1) the mechanism for pricing gas under the agreement, (2) the 20 year term of the agreement, (3) arbitrage opportunities, (4) a transportation fee consisting of a proposal to require Enstar's rate payers to pay in rates all costs associated with construction of NorthStar's gas pipeline, and (5) a requirement for ratepayers to pay for NorthStar's production taxes. The contract called for use of a pricing proxy, the Henry Hub index. Henry Hub is a lower 48 index for natural gas pricing that is divorced from Alaska and prices gas inclusive of taxes and transportation costs. Because of this, the AG argued it made little sense to price gas in Alaska by tying it to this market index, and that charging Enstar's ratepayers transportation costs and production taxes in addition to Henry Hub would be unreasonable and excessive.

The Commission issued its decision on March 23. In a 2 to 1 decision, the Commission allowed the use of the pricing mechanism objected to by the AG, but agreed to place a cap on the proposed transportation fee. Arbitrage was also limited in the Commission order to 15% of the total volume of gas sold. AAG Steve DeVries represented the state in this proceeding.

Paid Solicitors Enter into Assurances of Voluntary Compliance

Two paid solicitors, for-profit fundraisers for charitable organizations, have recently entered into Assurances of Voluntary Compliance in which they agreed to change their fundraising practices in Alaska. The paid solicitors are Sports and Entertainment Group of California, Inc., a California corporation, and Civic Development Group a New Jersey corporation. In both cases, the State alleged that the paid solicitors violated the Unfair Trade Practices and Consumer Protection Act and the Charitable Solicitations Act. Under the terms of the Assurances, neither SEG nor CDG admitted liability but both agreed to change their fundraising practices to ensure that their telephone solicitors fully disclose their identity and affiliation, describe how contributions will be used, and tell consumers that financial information and the solicitor's contract with the charity are available upon request. Both businesses agreed to make changes to their written solicitation materials and to improve employee training. In addition, SEG agreed to pay $7,500 and CDG paid $20,000 for consumer protection, education, and enforcement.

Sea Hawk Appeals to the 9th Circuit

In August 1997 Sea Hawk Seafoods obtained a $2.5 million judgment in the Alaska superior court against Valdez Fisheries Development Association. At that time VFDA owed the State over $8 million dollars and the State was secured in all assets owned by VFDA. The State was concerned that Sea Hawk would execute on VFDA's cash (from the salmon being harvested) despite the fact that the State had a security interest in the cash collateral from the fish. Since the State's loans were in jeopardy, the State called the loans due and VFDA paid the state cash of $1.7 million. Sea Hawk, in the original lawsuit, filed a fraudulent conveyance petition against the State and VFDA claiming the payment to be an illegal transfer. The superior court had not yet ruled on this issue when VFDA filed for Chapter 11 protection in March of 1998. During the bankruptcy Sea Hawk and VFDA reached a settlement agreement wherein VFDA paid Sea Hawk $1.5 million in full satisfaction of the judgment. The settlement was approved by the Bankruptcy Court and the Chapter 11 was dismissed.

Immediately after this dismissal, Sea Hawk returned to the superior court to pursue the fraudulent conveyance claim against the State

in an attempt to be paid the $900,000 remaining on the judgment against VFDA. The State defended this action by asserting that the Settlement Agreement with VFDA extinguished all of Sea Hawk's claims against it under the release language in the agreement. The superior court entered an order that the Bankruptcy Court retained jurisdiction to interpret the Settlement Agreement and the Alaska Supreme Court agreed.

Sea Hawk then went back to the Bankruptcy Court for a determination on this issue. The Bankruptcy Court raised *sua sponte* the question whether it had subject matter jurisdiction in light of the *Marathon Oil* case. This issue was briefed and the Bankruptcy Court ruled that it did have subject matter jurisdiction over the interpretation of the Settlement Agreement. Sea Hawk attempted an interlocutory appeal from this order but this was denied by the U.S. District Court. Just prior to trial Sea Hawk conceded it would lose on this issue and stipulated that the Settlement Agreement completely released the State from any further liability including any claims made or which could have been made in the State Court action. Sea Hawk then appealed to the U.S. District Court the Bankruptcy Court's decision that it could retain jurisdiction.

On March 15, 2004, Judge Beistline affirmed the Bankruptcy Court's decision. He concluded that this case did not fit neatly within *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375 (1994), and post-*Kokkonen* decisions in the Ninth Circuit. As was expected by the State, Sea Hawk has appealed this decision to the Ninth Circuit.

Environmental

Superior Court Dismisses Oil-spill Contingency Plan Appeals

Pro per plaintiff Tom Lakosh appealed decisions by DEC approving oil discharge prevention and contingency plans for the Valdez Marine Terminal and the tanker companies that transport crude oil from the terminal through Prince William Sound. The court granted the state's motion to dismiss the appeal on various grounds including that Lakosh had not exhausted his administrative remedies. AAG Alex Swiderski represented the state.

Human Services

Alaska Supreme Court Upholds Termination Even Though Child Did Not Have an Adoptive Placement

The Alaska Supreme Court decided *Louise A. v. State, DFYS*. In an unpublished Memorandum Opinion and Judgment (MOJ #1162, 03/17/2004, docket #S-11048) the court upheld termination of a mother's parental rights to her special-needs child. The single issue on appeal was whether termination of Louise's parental rights was in her child's best interests. The state argued that termination was in the child's interests because his special needs required stability and consistency in his life, and the mother's pattern of sporadic contact provided anything but the predictability he needed. In addition, the state argued that termination would benefit the child by eliminating the need to obtain the mother's consent to administer psychotropic medication to the boy, who had once gone several days without necessary medicine because the mother could not be found. The mother, who had a long history of untreated drug abuse and homelessness, and who had had only sporadic contact with the child for years, argued that

termination was not in the boy's interests because he was not likely to be adopted, and termination would, therefore, merely result in the loss of his inheritance rights. She argued that a court order could be obtained to take care of the consent-to-medicate concern.

The supreme court affirmed the termination of the mother's parental rights, noting the superior court's conclusions that even though an adoptive placement for the child had not been found, and might not ever be found, termination of the mother's rights would eliminate the uncertainty her visits caused the boy, and in addition would increase his chances for adoption, by allowing him to be placed on state and national adoption registers. The supreme court stated, "[f]reeing a child for the possibility of a permanent, stable home is sufficient; there need not actually be an adoptive home at the time of termination."

Regarding inheritance rights, the court noted that this issue only arises in the situation, not present here, where termination of one parent's rights, while preserving the other parent's, would render a child a "half-orphan." (Interestingly, the court stated that an "open question" exists as to whether termination decrees might provide for the retention of inheritance rights from terminated parents). The court left open the question whether the superior court could, in fact, issue an order authorizing psychotropic medication for minors in the state's custody. AAG Mike Hotchkin was the appellate attorney and AAG Kathy Hansen was the trial attorney.

Alaska Supreme Court Construes Relative Placement Preference Statute For Children In Need Of Aid

On March 19, 2004 the Alaska Supreme Court issued a decision in *Brynna B. v. State, DFYS*, docket #S-11070. This is an unusual child-in-need-of-aid case, in that the appeal was brought by the child's maternal aunt, who requested placement after the child was removed from her mother (the aunt's twin sister). DFYS denied the aunt's request for placement under the relative placement preference statute (AS 47.14.100). The department's decision was based on its determination that the aunt would not comply with the child's case plan, and in particular would likely allow the child's mother to have unsupervised control over the child. The superior court upheld DFYS's decision, and the supreme court affirmed the superior court's action.

The essential holding of this case is that DFYS (OCS) and the superior court may properly disregard the relative placement preference law based solely on the relative's likely non-compliance with a child's case plan. The supreme court discussed the aunt's history of opposing the department's involvement with this child, and concluded that "[t]he superior court did not commit clear error in determining that Brynna would fail to keep Jaclyn separated from Arlene as required by Jaclyn's case plan." (The aunt asserted that she would follow the case plan, but the superior court disagreed). The supreme court reasoned that because a parent's unwillingness to abide by a case plan may be considered by a court in making a termination decision (by clear and convincing evidence), "there is no logical reason not to consider unwillingness to abide by a case plan in foster placement decisions as well." (Denial of a relative's request for placement likewise requires a finding by clear and convincing evidence).

The court concluded that Brynna's "likely failure to abide by the case plan constitutes clear and convincing evidence of probable future physical or emotional harm to Jaclyn. The superior court therefore justifiably upheld the state's denial of Brynna's request to place Jaclyn in her custody, and we AFFIRM the decision of the superior court."

AAG Allan Beiswenger handled the superior court proceedings and AAG Mike Hotchkin handled the appeal.

Hearing Officer Affirms that Medicaid Recipient has Improved Enough to be Taken off the Medicaid Waiver Program

JJ is a school-aged child who was born with multiple birth defects. Early in her life, her special needs made her eligible for the extraordinary medical and environmental services available through the state's Children with Complex Medical Conditions waiver program. Thanks to her parents' hard work, and services provided by the state 's waiver program, JJ is now attending main stream public school classes. In September 2003, the state's Division of Senior and Disability Services notified JJ's family that she was being taken off the CCMC program because she no longer meets the eligibility standards. JJ's family, represented by the Disability Law Center of Alaska requested an administrative to challenge the denial. On March 26, the hearing officer assigned to the case affirmed the state's denial decision. AAG Dan Branch represented the state in this case.

Labor & State Affairs

Court Affirms Lieutenant Governor's Decision to Place Initiative on Ballot

We recently prevailed in the *Hinterberger II* case, the second lawsuit concerning the marijuana legalization initiative, "01 MRNA." In the earlier litigation on this initiative, the court ordered that the lieutenant governor must count previously rejected signatures for the initiative 01 MRNA. After counting those signatures, there were sufficient signatures to qualify the initiative for the ballot. The lieutenant governor then certified 01 MRNA for the ballot, and determined that the initiative should appear on the November 2004 general election ballot.

The initiative sponsors then filed the *Hinterberger II* lawsuit, arguing that the initiative should appear on the August 2004 primary election ballot. The sponsors claimed that the initiative was properly filed at the time the petition signatures were delivered, and before the court ruled in the earlier litigation that rejected signatures should be counted. The lieutenant governor's position was that the initiative was not properly filed at the earlier date because it was facially invalid at delivery. The initiative was not filed until after the court's decision in the prior lawsuit, and after sufficient signatures were submitted in support of the initiative.

The judge in *Hinterberger II* agreed with the lieutenant governor's position, finding that the initiative was facially invalid at the time the sponsors originally delivered the petitions to the division of elections. Therefore, the initiative was not filed at that time, and would be considered filed at the later date, after the court's order in *Hinterberger I.* Under the statutes governing ballot placement for an initiative, an initiative may not be placed on the ballot until after it has been filed, after a legislative session has convened and adjourned, and 120 days have passed since adjournment. The judge in *Hinterberger II* found that given this law, and given the later filing date for 01 MRNA, that the initiative should appear on the November 2004 general election ballot.

Arbitration Bars Wrongful Discharge Action

Judge Larry Weeks determined that an arbitration pursuant to a collective bargaining agreement bars a subsequent wrongful discharge action under the doctrine of *res judicata.* The grievance claimed that the state had dismissed the employee without just cause, in violation of the bargaining agreement. The arbitrator denied the grievance on the merits, upholding the dismissal. The court found that the arbitration satisfied the requirements of the doctrine of *res judicata*: the arbitration was a final judgment on the merits; the arbitration met the requirement of a judgment by a court of competent jurisdiction; and the employment dispute forming the basis

for the lawsuit was the same dispute that the arbitrator considered and that the employee and the bargaining representative that pursued the arbitration were in privity. AAG Jan Hart DeYoung represented the state in this case.

Superior Court Affirms Labor Relations Agency's Order to Arbitrate Employee Grievance

Judge Larry Weeks affirmed an Alaska Labor Relations Agency decision ordering the state to arbitrate an employee grievance. The state had "granted" the grievance that the union had filed on behalf of the employee, but the union and state disagreed over the appropriate remedy for the employee. The state's position was that reinstatement with full back pay and benefits (which it had made available to the employee) was the complete remedy owed under the employment agreement, and the matter was moot because there was nothing further for the arbitrator to award. The court determined that whether the grievance had settled and whether any additional remedy was due were appropriate questions for the arbitrator, and he denied the state's appeal. However, the court did agree with the state that the arbitrator could not award attorney's fees that the employee had incurred in an earlier lawsuit against the state, finding that the court's earlier order addressing attorney's fees under Civil Rule 82 was binding on the parties. AAG Jan Hart DeYoung handled this case.

Legislation & Regulations

Legislative Session Makes March a Busy Month

During March, 2004, the legislation and regulations section spent a busy month with the legislature in session. The section edited bills and amendments for consideration by the governor's office. The section also coordinated legal testimony for the executive branch for legislative hearings. The section also closely monitored key pieces of the governor's legislative branch to provide legal information to aid in legislative deliberations. The section also conducted the preparation of bill reviews of legal analysis pending for governor's action.

The section also performed final edits of several regulations packages that were approved for filing by the lieutenant governor's office. The regulations projects included *ex parte* communications and miscellaneous matters for the Regulatory Commission of Alaska; brain tumor reporting for the Department of Health and Social Services; tire fees for Department of Revenue; fingerprint and background checks for teachers for the State Board of Education and Early Development; several occupational licensing projects for occupational licensing boards, Department of Community and Economic Development; and numerous fish and game regulations for the Board of Fisheries and Board of Game.

Natural Resources

Intervention Sought in Tustumena Wilderness Case

The State moved to intervene in the Ninth Circuit in *The Wilderness Society, et al., v. United States Fish and Wildlife Service* in early March. An *en banc* panel of the court ruled against the U.S. Fish and Wildlife Service (USFWS) in December. The court directed the district court to issue a permanent injunction halting a sockeye salmon enhancement project that has been ongoing for 30 years in Tustumena Lake in the Kenai National Wildlife Refuge. The project began in 1974 as an ADF&G undertaking, but is now operated by Cook Inlet Aquaculture Association under a contract with ADF&G and a permit from USFWS. Plaintiffs challenged the project as a prohibited "commercial enterprise" under the

Wilderness Act because of its positive impact on the Cook Inlet salmon fishery.

The U.S. District Court and a three-judge Ninth Circuit panel upheld the USFWS decision to issue the permit; however, on rehearing, the *en banc* panel reversed. Following a limited request for a second rehearing, the *en banc* panel amended its December decision to give the district court discretion to allow USFWS to permit the release of the 6 million fry destined for Tustumena Lake for this year only. The State moved to intervene for purposes of seeking certiorari in the U.S. Supreme Court. AAGs Elizabeth Barry and Laura Bottger represented the State in this matter.

Oral Argument in Chignik Salmon Co-Op Case

AAG Lance Nelson argued in defense of the Board of Fisheries Chignik commercial salmon cooperative fishery regulation before the Alaska Supreme Court on March 9 in Juneau. The court took a very active role in questioning the parties on this fairly novel regulation that allocates a portion of the Chignik sockeye salmon run to a voluntary co-op with a membership of at least 51% of the permit holders. The co-op has been fairly successful in its first two years of operation, harvesting higher quality salmon and reducing overhead expenses.

Alaska Supreme Court Rules for CFEC in *Kuzmin v. State*

On March 24, the Alaska Supreme Court issued a memorandum opinion and judgment in favor of the state in *Kuzmin v. State*, Commercial Fisheries Entry Commission. The case, in which Mr. Kuzmin challenged the CFEC's denial of his application for a limited entry permit, involved complex testimony regarding vessel ownership, fishery participation, and economic dependence on the fishery. The court decided the case on the basis of factual issues and accepted the State's argument that Mr. Kuzmin's due process claims were moot. AAG Jon Goltz argued the case for the state.

Shoreline Adventures, LLC v. One Shipwrecked Vessel Known as SS Aleutian

On March 9 the State moved to intervene in *Shoreline Adventures, LLC v. One Shipwrecked Vessel Known as SS Aleutian*, No. A03-0188 CV (JKS), an admiralty case in U.S. District Court in Anchorage. The *Aleutian* is an Alaska Steamship vessel that sank near Larsen Bay, off Kodiak Island, in 1929. The plaintiff initially approached the state about obtaining permits to dive on the wreck, which is located on state-owned submerged lands. However, Shoreline then filed an admiralty claim against the vessel, and despite knowledge of the state's claim to the vessel under the Alaska Historic Preservation Act, AS 41.35, did not name the state as a defendant. The state's motion to intervene asserts that under the AHPA and the federal Abandoned Shipwrecks Act, Shoreline's admiralty claim is preempted, and title to the vessel has vested in the state. Shoreline's response is due April 16.

AAG John Baker represents DNR's Office of History and Archeology in this case.

State Defends Ownership of Tide and Submerged Lands

The Department of Law sent a strong letter to the Kenai Peninsula Borough Planning Commission, defending the state's interest in state-owned tide and submerged lands near the Anchor River. A private land owner in the area seeking to subdivide his lands, had proposed to include state-owned lands as his own in his proposed plat. Relying on the state's assertions, the Kenai Borough Planning Commission unanimously denied approval of the proposed subdivision plat.

Opinions, Appeals & Ethics

Lawsuit Seeks Disclosure of Records Relating to Ethics Investigation

In February, the Anchorage Daily News, KTUU Channel 2, and the Associated Press filed suit against the AOGCC alleging that the state had wrongfully denied them access to certain public records. The press organizations had made public records requests for e-mail messages and other documents concerning Randy Ruedrich's political activities conducted while he was employed as a commissioner at the AOGCC, or using state facilities and equipment. The request was denied in December on the basis that the records sought were required to be kept confidential by state law, citing AS 40.25.120(a)(4). We were unable to state a more specific ground for denial (*i.e.,* because the records requested were gathered by the attorney general's office in the course of an ethics investigation) because to do so would have breached the confidentiality requirements of the Ethics Act.

In March we filed a motion for confidential proceedings, arguing that conducting the proceedings confidentially was necessary to serve a compelling state interest and was the only way we could fully inform the court on the issues without violating a state statute. The motion asked that all pleadings to be filed under seal and that all parties to the litigation maintain confidentiality. Before the motion was decided, Mr. Ruedrich waived his confidentiality and the records at issue have since been disclosed to the plaintiffs and widely distributed to others as well. AAG Dave Jones did the primary work on this motion, working with AAGs Barbara Ritchie and Mary Lundquist.

Torts & Workers' Compensation

Alaska Supreme Court Accepts Petition for Review

On March 3, 2004, the Alaska Supreme Court accepted the State's petition for review of a trial court order denying summary judgment on a duty issue where a mandatory parolee had killed his girlfriend and then himself (and accidentally their 4 mo. old daughter). Plaintiff had brought a claim of negligent parole supervision, relying on *Neakok v. State*, a 1986 Supreme Court decision. The State moved for summary judgment relying on *Sandsness v. State*, a 2003 supreme court decision, which facially only applies to juveniles, but arguing that its reasoning should apply to adult corrections decisions too.

In the same case, AAG Vermont completed major briefing to the trial court on plaintiff's challenge to the constitutionality of the cap on non-economic damages. The supreme court was split 2-2 on this issue in the *Evans* case challenging much of the Tort Reform of 1997.

The supreme court's acceptance of the *Neakok/Sandsness* issue on petition was the second petition lodged by the section in a month on this same issue. AAG Venable Vermont is representing the State in this case (*Cowles)*, and Stephanie Galbraith is representing the State in the earlier petition (*C.J.)*.

Transportation

Nuclear Regulatory Commission Issues Conclusions

A DOT&PF employee asserted nuclear density gauges used to measure the quality of asphalt were improperly stored, and that DOT&PF retaliated against him for reporting the issue.

DOT&PF presented evidence to the Occupational Safety and Health Administration (OSHA) and the Nuclear Regulatory Commission (NRC) that any personnel actions regarding the employee were unrelated to any safety or whistleblower complaints or concerns. Although OSHA's investigator agreed that DOT&PF did not discriminate, the NRC believed discrimination occurred. DOT&PF, while not agreeing that any discrimination had taken place, decided not to appeal and agreed to an NRC Confirmatory Order that did not assess a civil penalty.

In a separate, but related NRC enforcement matter involving the Department's radiation safety program, the NRC found three civil violations occurred between 1994 and 2000, and issued a civil penalty of $21,000.

DOT&PF believes the program review and additional safety conscious work environment training set forth in the agreed-upon NRC Order will improve the department's Safety Conscious Work Environment and safety culture.

AAG Gary Gantz assisted DOT&PF.

Wetlands Permit Revoked

The U.S. Army Corps of Engineers revoked a permit authorizing approximately 200 acres of fill to be placed at the Ted Stevens Anchorage International Airport. The Corps determined that an air quality calculation supporting its original decision to issue the permit was incorrect. Following the Corps' revocation, the Ninth Circuit Court of Appeals dismissed as moot an appeal concerning the permit brought by the Alaska Center for the Environment and other environmental groups. CAAG Jim Cantor represented the State in this matter.

Kenai River Bridge Construction Challenged

DOT&PF plans to reconstruct the bridge over the Kenai River in Soldotna to improve traffic flow. DOT&PF condemned a temporary easement to allow construction of a temporary bridge while reconstruction of the permanent bridge proceeds. The landowner has challenged DOT&PF's authority to condemn the temporary easement. AAG Peter Putzier is helping DOT&PF oppose the challenge.

Relocation Benefit Award Upheld

When a property owner adjacent to a highway project receives a reasonable award based on cost to cure, rather than removal of his structure, but then later removes the structure, the condemnee is not then eligible to receive relocation benefits to compensate costs related to the move. A property owner appealed DOT&PF's denial of relocation benefits related to the move, asserting the law required the payment of benefits. An administrative review panel upheld DOT&PF's denial. AAG Gary Gantz represented DOT&PF's relocation benefits staff.

Criminal Division

ANCHORAGE

Cynthia Lord was indicted for three counts of first degree murder for shooting her three sons in their apartment in south Anchorage, each on separate occasions over a twelve-hour period. She shot Michael as he slept on a couch around 3:30 a.m., Christopher as he sat in front of a television set later in the day, and Joseph as he returned from school at 2:35 p.m. She was charged with three counts of murder in the first degree.

The grand jury indicted a man for murder in the second degree for the stabbing another man to death in the drive-up line at the Taco Bell restaurant on Fifth Avenue. The grand jury also indicted a woman for murder in the second degree for shooting her ex-lover as she let him in her house and as he was running from her house.

ADA Mary Fisher convicted Leroy Stansberry in a jury trial of refusing to provide a DNA sample. Stansberry had been convicted of theft in the second degree in early 2003. Although the judgment of conviction did not include an order that he provide a DNA sample, the law did. When a trooper asked him to submit to an oral swab for DNA testing and he refused, troopers got a search warrant for DNA and the DNA identified Stansberry as the rapist in sexual assaults in Palmer. Stansberry has now been convicted of refusal to provide a DNA sample, and the Palmer District Attorney's Office has charged him in the sexual assaults.

In other jury trials, ADA Ben Hofmeister convicted Claude Joseph in a jury trial of misconduct involving a controlled substance in the third degree for possessing one-half ounce of crack cocaine in Mountain View. ADA Curtis Martin convicted Charles Porter of violating a domestic violence protective order. ADA Erin White convicted Alan LaPage, a hospital nurse, for performing oral sex on a brain-damaged patient at the hospital.

BETHEL

Sampson Kassock pled out during a trial to multiple charges in a domestic violence case that was being tried in Emmonak. After the trial ended, several jurors thanked paralegal Jody Lown (who accompanied ADA Jean Seaton to the village to assist with the victim) for the work that she was doing and for being there. Kassock received a substantial sentence. In another trial, Aaron Elia was found not guilty of felony failure to stop at the direction of a police officer and reckless driving.

During the month of March there were indictments for three sexual assaults in the first degree, one sexual assault in the second degree, two assaults in the third degree, one attempted sexual assault in the first degree and two sexual assaults of a minor in the second degree. Other indictments included kidnapping, three for felony driving under the influence, two for sale of alcohol without a license, misconduct involving a controlled substance, manufacture of alcohol, vehicle theft, burglary and arson.

DA Gregg Olson taught a two hours session for Village Police Officers and Village Public Safety Officers on domestic violence laws and preparing cases for a training program put on by Tundra Women's Coalition.

FAIRBANKS

A Fairbanks jury found five-term North Slope Borough Mayor George Ahmaogak guilty of driving under the influence of alcohol. Ahmaogak was arrested last July after he was seen driving in the wrong lane of traffic and bumping into the median after making a left turn from University Avenue onto Airport Way.

Alfred Davis, a 19-year-old who wore a white sheet over his head and made racial slurs as he kidnapped and beat another man, plead no contest to assault in the third degree. Sentencing is scheduled for August.

Michael Deneut, accused of a double homicide in the shooting death of two local Fairbanks men, pled no contest to first and second degree murder. Sentencing is scheduled for June.

Two men have been charged with first-degree kidnapping and first-degree assault after severely beating another man for several hours.

JUNEAU

The noteworthy jury trial of the month for the Juneau District Attorney's Office occurred in Wrangell (now covered by the Juneau DAO) where Rick Svobodny, Senior Attorney, added insult to injury when he successfully prosecuted a case of weapons misconduct in the third degree. The case was against an ex-felon who had accidentally shot himself when a handgun fell out of his pocket and fired as he stopped off

his boat. It is rare when the evidence of possession can be so graphically illustrated to a jury.

KENAI

A grandfather who molested his three granddaughters was sentenced to serve twenty years. Two of the three victims were at the sentencing with their foster mother and seemed to gain some closure from being there and having their letters read to the court. Their mother was sentenced two days later for allowing the molestation and for taking the girls out of state in an effort to hide them from the authorities.

Quote of the month is from a felony drunk driving defendant who was stopped heading south from Anchorage. When asked by the officer where he thought he was, his response was "somewhere between Seward and Anarchy."

A Kenai jury convicted a defendant of having sexual intercourse with a victim who was unaware that sexual acts were occurring. The 19-year-old victim was asleep with her boyfriend in their bed, with some alcohol on board; the defendant was the boyfriend's ex-stepfather.

KETCHIKAN

In a bizarre burglary case, a Ketchikan jury convicted Brock Charles of two charges of burglary in the first degree. Charles had accompanied his nephew into the residence of a 17-year-old girl and her mother. The nephew had dated the girl but they had broken up and he was upset with the girl and her new boyfriend. The first burglary occurred at midnight when Charles and the nephew walked into the residence while everyone was asleep and then attacked the new boyfriend, who was sleeping over. A week later, at about two in the morning, Charles, the nephew and two other men went to the same house and forced their way in. A friend of the girl walked up the door while this was going on and the party proceeded to beat him up. The nephew and another man then entered the house and attacked the new boyfriend again, and also the mother and the girl. When the mother asked Charles to stop them, he looked at her and replied that he really killed “that guy” and that he could do the same to her. Charles was referring to charges he faced the year before when he was acquitted of murder for beating a man to death. The mother felt intimidated by this threat. The nephew and one of the other men pled to burglary. A fourth defendant was acquitted when the jury found that he had been with them but had done nothing else.

In two jury trials, drunk drivers were unsuccessful in changing their stories. A Craig jury convicted William Heacock of driving under the influence. His defense was that he drank after driving. However, Heacock originally told the trooper on tape that he had not drank since driving. On the stand at trial he changed his story and said he chugged an entire bottle of homemade chianti in the few minutes between driving and the troopers arriving. When asked if he lied to the troopers or was lying on the stand, he said he lied to the troopers. The jury obviously believed his original statement to the trooper over his testimony. This was his fourth driving while intoxicated conviction. In another trial, a Ketchikan jury rejected this same defense and convicted John Keller of driving while intoxicated. Keller blew exactly .08 after driving over a street sign in a parking lot.

A Ketchikan jury convicted Wayde King of assault in the fourth degree. King had head-butted his nephew in the face, causing injury. He claimed he was just ducking his head to defend his face from his nephew (who was trying to stop King from hitting the nephew’s cousin). This was the seventh assault conviction for King.

Blaming the wife seemed to be the defense of choice for a man indicted for possession of child pornography. A couple of years ago he was charged with possession of child

pornography but convicted of attempted possession. The defense then was that he did not knowingly possess it since his wife planted it on his computer to get him into trouble and then divorced him. On his new charges, he is now claiming that his new wife, not he, possessed the child pornography and was responsible for putting it on his computer.

Two men were indicted for burglary, robbery, felony assault, felony theft and misconduct involving controlled substances. With hoods over their heads, they forced their way in to an apartment. One of them pistol-whipped the resident, and grabbed the man's fanny-pack from around him, and the two ran out. They then divided the methamphetamine in his fanny-pack. Luckily, the apartment building they entered had a video camera covering each entrance into the building, and showed them walking up to the building, waiting until someone let them in, and them running out. After being caught, both confessed.

A woman was indicted for assault in the first degree and assault in the third degree. She drove while drunk and crashed her car. Two passengers who were with her were injured, one seriously injured. Others were indicted for assault in the third degree, misconduct involving controlled substances in the second degree for possessing materials to make methamphetamine and burglary in the first degree.

KODIAK

A Kodiak man was convicted of sexual assault of a minor in the second degree and assault in the second degree, both class B felonies. He was sentenced to 10 years in prison, with 5 years suspended, following which he will be placed on probation for 10 years. He was also ordered to register as a sexual offender for life.

A Kodiak woman with no prior criminal history was convicted of hindering prosecution in the first degree, a class C felony, for assisting her son in illegally fleeing the State of Colorado by making a false identification card for him. She was sentenced to 5 days in jail, ordered to pay a fine of $500, and ordered to complete 160 hours of community work service, and placed on supervised probation for a period of three years. In the meantime her son was returned to the State of Colorado.

A Kodiak man was convicted of felony driving while intoxicated and driving with a suspended license. He was sentenced to a composite 27 months with 19 months suspended. He was also placed on probation for 7 years on conditions which included that he not consume any alcohol during his period of probation and that he not drive a motor vehicle without first obtaining a valid driver's license.

KOTZEBUE

A Kotzebue Middle School teacher who also worked part-time at a home for mentally challenged people was arrested for Wayne Jackson for sexual assault in the first degree and admitted to sexual intercourse with one of the clients at the home who was under his control.

A Kotzebue man was arrested on charges of first degree assault after the victim told police that he was hit with a baseball bat after he called the man a baby killer. The defendant is a suspect in the death of an infant who was struck in the head by a baseball bat earlier in the month. The adult victim in the new case suffered a broken arm and facial injuries. Investigation is ongoing in the death of the infant.

A Kotzebue man was indicted by a Kotzebue Grand Jury on four counts of assault in the third degree for threatening four children, including three of his own grandchildren, with a knife. Another Kotzebue man was indicted for sexual assault in the second degree and misconduct involving a controlled substance in the first degree. The victim reported to police that she had fallen asleep at Ferguson’s house and

awoke to Ferguson having sex with her against her will. The victim also reported that Ferguson was smoking crack and blew crack smoke into her face.

NOME

Russell and Nastasia Silook were convicted by a Nome jury of the offense of misconduct involving a controlled substance in the fourth degree, possession of marijuana with intent to distribute. The marijuana was intercepted in transit to the village of Gambell. One-ounce baggies of marijuana, eight ounces total, had been embedded inside about a pound of hamburger per baggie; the burger was then wrapped and frozen as if it was game meat or home-processed ground meat. The Silook's defense was that they had no idea there was marijuana in their shipment of groceries. The State's closing argument centered on the un-likelihood of the "dope fairy" picking that particular day to visit Gambell.

A Nome man was arrested and later indicted on charges of felony assault and criminal mischief for slashing the tires of a man he felt to be carrying on with his wife, then chasing a witness down the street with a knife. One unusual aspect of the case was that the man was free on $10,000 cash bail on an earlier felony assault on his wife. The bail forfeiture in that case combined with a $10,000 bail forfeiture earlier in the month in *State v. Andrew Ningealook*, plus several smaller forfeitures, means that the income generated by the Nome office may have exceeded expenses for the month.

A man was arrested and charged with a felony drunk driving after the police found him intoxicated and sitting in a vehicle several miles outside of town with the motor running. One tip-off to the degree of his intoxication was that he was unaware that he had rolled the vehicle and that it happened to land upright.

PALMER

In a case which received a great deal of attention, Caleb Bennett was sentenced to two years incarceration with one year suspended, five years probation and over $15,000 in restitution for the shooting of several tame, hand-raised reindeer at a farm in Palmer. Bennett, age 20, was a former employee of the reindeer farm and claimed he was high on drugs and alcohol at the time of the shooting. This was much more than a "property damage" case to the owners and the children who befriended the animals.

Kelly Carr was convicted by a jury of two counts of sexual abuse of a minor in the first degree, two counts of sexual abuse of a minor in the second degree, one count of unlawful exploitation of a minor and six counts of possession of child pornography. Carr, a quadriplegic with limited use of his arms, sexually abused a 4-year-old niece and his 9-year-old daughter and videotaped both victims. Carr was out on bail for two and a half years pending trial and was remanded after the jury verdicts.

Shane Neuharth was convicted after a jury trial of four counts of misconduct involving controlled substances in the fourth degree. Neuharth had a marijuana grow consisting of 37 plants, which yielded 1.7 pounds of processed marijuana. After being tested by the State Crime Lab, the marijuana was sent to an out-of-state independent lab picked by the defense for testing. The marijuana was never sent back by the independent lab and, at trial, the defense argued that the plants were hemp, not marijuana. The jury needed only one hour of deliberation to return the guilty verdicts.

Leroy Stansberry, indicted in December of 2003 on the rapes of two women, was indicted on additional charges of sexual assault involving three other victims. One of the incidents dates back to 1996. DNA evidence contributed to the indictments. Stansberry's

trial on multiple counts of sexual assault in the first degree and kidnapping is set for April.

A Tazlina resident was indicted on two counts of attempted murder and six counts of assault in the third degree for stabbing his cousin, stabbing a friend and threatening a number of juveniles. A breath test two hours after the incident revealed a breath alcohol content of .230. A man was indicted on charges of robbery in the first degree, theft in the second degree and assault in the third degree. Armed with a handgun, he robbed the Susitna Professional Pharmacy in Wasilla in late 2003, obtaining a significant quantity of Oxycontin. In addition, 24 other defendants were indicted on various felony counts in March.

OSPA
(Office of Special Prosecutions & Appeals)

Special Prosecution Unit

The former director of Facilities Planning and Construction for the University of Alaska, Anchorage was indicted on 11 counts including theft in the first degree, scheme to defraud, and falsification of business records. He is charged with embezzling over $110,000 from the university by diverting contract work to his own company, not disclosing that it was his own company, never actually doing the work, and then representing in his capacity as director that the work had been done.

Javier Velasco, the former Controller for the Westmark Hotel in Anchorage and a first offender, received five years with two and a half years suspended for theft in the second degree after embezzling from his employer over a period of several years.

A Fairbanks police officer was charged with unsworn falsification and evading the I/M program. After a fender-bender with his private vehicle, police noticed that the officer's license was suspended for an out-of-state traffic ticket and that his vehicle was registered outside the borough where vehicles are not required to undergo emissions testing.

From jail, a defendant penned a four-page letter to Office of Special Prosecutions and Appeals that was critical of the troopers and contained his unique legal analysis, which included his admission that that he never charged people to drink his alcoholic concoction. Unfortunately for him, he is charged with manufacturing, not sale. This letter, which unsurprisingly was not approved by his attorney, was signed "Criminally."

A woman who allowed her snow-machine to be used by co-defendants to import alcohol in exchange for two bottles of whiskey did not receive the benefit of her bargain. She received 30 days in jail and her snow-machine was forfeited to the state. To add insult to injury, her co-defendants shorted her and only brought her one bottle of whiskey.

Billy Ray Boyer, a personal care attendant paid by the Medicaid program, was convicted of medical assistance fraud for submitting falsified time sheets that claimed more hours than were actually worked. Suspicions were aroused when timesheets showed Boyer working on a day that authorities knew the care recipient was not home. Additional false entries were found and Boyer lost his S.I.S. in a previous theft case.

Petitions & Briefs of Interest

Appeals Unit

Post-conviction DNA testing. The state argues to the Alaska Court of Appeals that a defendant seeking post-conviction DNA testing or re-testing of evidence should satisfy the same five-factor test for a defendant seeking post-conviction relief based on newly discovered evidence, because the results of the forensic test would constitute new evidence. Under this

test, the defendant must establish that (1) the evidence is newly discovered; (2) the new evidence was discovered and presented with due diligence; (3) the new evidence is not merely cumulative or impeaching; (4) the new evidence is material to the issues; and (5) the new evidence would probably produce an acquittal on retrial. Since the defendant cannot know the results of the DNA testing until after the test is conducted, to satisfy the fifth requirement, the prisoner would have to demonstrate that if the results are favorable, introduction of the results would probably produce an acquittal. *Osborne v. State,* A-8399.

Right to confrontation – hearsay statements of testifying witness. The state argues to the Alaska Supreme Court that the introduction of hearsay statements by a sexual-abuse victim did not violate the defendant's right to confrontation where the victim testified despite the fact that she had no recollection of the abuse or having made the statements. The state also argues that by waiving his right to cross-examine the victim, the defendant failed to make the record necessary to establish that he had been denied the opportunity to cross-examine her. *Vaska v. State,* S-11171.

Post-conviction relief – claimed discovery violations. The state argues to the Court of Appeals that a post-conviction applicant requesting a new trial on account of an alleged discovery violation must demonstrate the existence of evidence that would be admissible at trial, that the evidence is material, and that prejudice resulted from the alleged non-disclosure. The state makes this argument in a case where the defendant has claimed that he should have been given more information about the tipster who first told the police that the defendant's father had been lamenting about his son's involvement in a robbery. The tipster's information was provided at a search-warrant hearing to show why the police had begun to view the defendant as a suspect, but the tipster was not called as a witness at trial. *Woodard v. State*, A-8243.

Statute and Rule Interpretations

Sentence-appeal rights. In *Amin v. State*, 939 P.2d 413 (Alaska App. 1997), the superior court held that 1995 legislation limiting the right to bring a direct appeal of one's sentence is not an *ex post facto* law even if applied to pre-1995 crimes. Acting *pro se*, Amin and others have brought suit against the Public Defender Agency, the Office of Public Advocacy, and past and present governors and attorney generals, claiming that the 1995 legislation is unconstitutional. Among other things, the plaintiffs seek declaratory judgment, class certification, and punitive damages. Assistant Attorney General Mike McLaughlin is defending the state in this matter. *Latham et al. v. Alaska Public Defender Agency et al*., 3AN-03-13498 CV.

Ninth Circuit rejects remaining claims concerning Alaska's sex-offender registration act. The Ninth Circuit Court of Appeals held that Alaska's sex-offender registration act does not violate the defendants' constitutional rights to procedural due process or substantive due process. These claims remained to be decided after the state's successful appeal to the United States Supreme Court in *Smith v. Doe*, 538 U.S. 84, 123 S.Ct. 1140 (2003), of the Court of Appeals's original (erroneous) decision holding that the act violated the *Ex Post Facto* clause. *Doe v. Tandeske*, 361 F.3d 594 (9th Cir., March 17, 2004).